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IN THE WATER COURT OF THE STATE OF MONTANA
LOWER MISSOURI DIVISION
MISSOURI RIVER BASIN BETWEEN MUSSELSHELL RIVER
AND FORT PECK DAM - BASIN (40E)

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| IN THE MATTER OF THE ADJUDICATION OF THE EXISTING RIGHTS TO THE USE OF ALL THE WATER, BOTH SURFACE AND UNDER-GROUND, WITHIN THE MISSOURI RIVER BASIN DRAINAGE AREA, BETWEEN THE MUSSELSHELL RIVER AND FORT PECK DAM INCLUDING ALL TRIBUTARIES OF THE MISSOURI RIVER BETWEEN THE MUSSELSHELL RIVER AND FORT PECK DAM IN GARFIELD, McCONE, PHILLIPS, PRAIRIE, & VALLEY COUNTIES, MONTANA. | ) | **CASE NO. 40E-A**<br><br>**FILED:**<br>**JUNE 29, 2005**<br>**MT WATER COURT** |

CLAIMANTS: Lawrence Edwards and Kathleen Edwards; Mike Pierson; James Kirkland and Bobette Kirkland; Don Burke and Myrtle Burke; Dave Huston and Kathryn Huston; Melvin Thomas and Evelyn Thomas; Conservation Fund; Clay Taylor and Karen Taylor; Woods Bar 6 Ranch; Arnston Ranch Inc.; Towe Farms; Silver Dollar Grazing Association; Twitchell Ranch; Gene Buxcel; Lyle E. Nelson Trust; Wittmayer Grazing Assn; Spear J, Inc.; Page Whitham Land and Cattle; Martawn Veseth; Seven Blackfoot Company; McKeever Land and Cattle Company; Russell Nickels; Lester Nickels

## OPINION

This case involves the consolidation of fifty six objections filed by the United States Bureau of Land Management ("BLM") and forty eight objections filed by the United States Fish and Wildlife Service to 104 stockwater claims, filed by twenty-two claimants in the Missouri River Basin between the Musselshell River and Fort Peck Dam. Due to their complexity, the late Chief Water Judge W.W. Lessley ordered informational and position

statements by the parties. On February 5, 1990, the parties filed their position statements. The case was referred to Water Master John E. Bloomquist, who reconsolidated the claims into Water Court Case 40E-A.

In December 1990, the Claimants filed a Motion for Partial Summary Judgment on Legal Issues Relating to Private Ownership of Water Rights on Federally Administered Lands, and in February 1991, the United States filed a Motion for Partial Summary Judgment. On April 5, 1991, the Water Master issued an Order and Memorandum on Motions for Partial Summary Judgment which denied the motion of the United States and granted the Claimants' motion.

On June 27, 1991, the United States filed a Motion to Vacate the Master's Order of April 5, 1991, which this Court subsequently denied, but with permission to serve written objections to the Master's Order and Memorandum within certain prescribed time frames.

On September 23, 1991, the United States jointly moved this Court, pursuant to Rule 53(e)(2), M.R.Civ.P., to modify the Water Master's Report in accordance with the objections set forth in a separate document. The parties submitted this matter on briefs and waived oral argument.

## I. JURISDICTION

The Montana Water Court has jurisdiction to review all objections to temporary preliminary decrees under the authority granted in § 85-2-233, MCA. It has concurrent jurisdiction to adjudicate federal rights to the use of water and to review federal objections to state based water right claims filed in comprehensive state water rights adjudications under the authority granted by the McCarran Amendment of 1952, 43 U.S.C. § 666 (2000) and §§ 85-2-231, -233, and -234, MCA. *See Arizona v. San Carlos Apache Tribe* (1983), 463 U.S. 545, 549, 103 S. Ct. 3201, 3204-05, 77 L. Ed. 2d 837, 845; *Colo. River Water Conservation Dist. v. United States* (1976), 424 U.S. 800, 812, 96 S. Ct. 1236, 1243, 47 L. Ed. 2d 483, 495; *State ex rel. Greely v. Confederated Salish & Kootenai Tribes* (1985), 219 Mont. 76, 84, 86, 712 P.2d 754, 759; *State ex rel. Greely v. Water Court* (1984), 214 Mont. 143, 152, 691 P.2d 833, 838.

## II. STANDARD OF REVIEW

The Montana Water Court's standard of review for objections to summary judgment rulings by a Water Master is *de novo*. *Mead v. M.S.B., Inc.* (1994), 264 Mont. 465, 470, 872 P.2d 782, 785. When a Water Judge reviews a Water Master's recommendation to grant summary judgment, the judge applies the same evaluation that the Water Master applied to decide the summary judgment motion. *Bruner v. Yellowstone County* (1995), 272 Mont. 261, 264, 900 P.2d 901. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), M.R.Civ.P. The water judge reviews the legal conclusions of a Master in a summary judgment ruling for error. *Bruner*, 272 Mont. at 265. When reviewing objections made on the basis of state law, the court must apply state law; when reviewing objections made on the basis of federal law, the court must apply federal law. *San Carlos Apache Tribe*, 463 U.S. at 551, 571; *Colo. River Water Conservation Dist.*, 424 U.S. at 812-13; *Confederated Salish & Kootenai Tribes*, 219 Mont. at 95.

## III. LEGAL ISSUES

The parties briefed their objections to the Master's Report beginning at different starting points. The United States argued the issue from 1934, the Claimants from years earlier. The United States argues that the Master "misstates the issue which is not whether an individual can appropriate water on public land by complying with state procedures. Rather, the issue is whether an individual can claim appropriative rights in water sources on Taylor Grazing Act lands based solely on those permits."[1]

For clarity, this Court will begin with the issue presented by the United States in its Motion for Partial Summary Judgment requesting this Court:

> [T]o enter summary judgment that Claimants' use of the sources of water located upon the public domain and reserved lands of the United States for livestock watering does not constitute an appropriation of water entitling them to a decree and that the title to the rights to the use of water for livestock watering on the public domain and reserved lands involved is in the United

[1] Objections of the United States to the Water Master's Report, Case 40E-A 16 (Sept. 23, 1991). *See also* Reply Brief of United States in Support of Objections to Water Master's Report, Case 40E-A 5-6 (Dec. 4, 1991).

States.[2]

Inherent in this primary issue are the following specific legal issues raised by the parties:

A. Whether Montana law as it existed prior to July 1, 1973 required the appropriators in this case to maintain "exclusive use, dominion and control" over water in order to appropriate and maintain private water rights?

B. Whether the rationale for governmental ownership and control of stockwater rights appropriated on and for use on state school trust lands as set forth in *Dep't of State Lands v. Pettibone* (1985), 216 Mont. 361, 702 P.2d 948 is applicable to the federal public lands in this case?

C. Whether the Livestock Reservoir Siting Act of January 13, 1897 precluded or preempted the appropriation and impoundment of private stockwater rights for livestock grazing on federal lands?

D. Whether the Stock Raising Homestead Act of 1916 or Public Water Reserve No. 107 precluded or preempted the appropriation of private stockwater rights from the springs and water holes on the public domain involved in this case?

E. Whether the Taylor Grazing Act of 1934 precluded or preempted the appropriation of private stockwater rights on lands classified and administered by the Bureau of Land Management involved in this case?

F. Whether the federal Acts and Orders creating the Charles M. Russell ("CMR") and UL Bend National Wildlife Refuges ("UL Bend") precluded or preempted the appropriation of private stockwater rights on the reserved lands involved in this case?

This opinion is the first in a series of decisions that the Water Court will be issuing in the next few weeks involving public land and livestock issues. *See, e.g.,* Water Court Cases 41G-190 and 41G-3.

## IV. DISCUSSION

### Background

[2] Motion for Partial Summary Judgment, Case 40E-A (Feb. 11, 1991).

The pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, statements of position, and public records, establish that:

Basin 40E is situated in north-central Montana and includes all water rights within the Missouri River basin between the confluence of the Musselshell River with the Missouri River, and Fort Peck Dam. Historically, the lands were part of the public domain, and livestock owners in the area grazed their livestock on the "open range." Over time, the livestock owners appropriated water from a variety of sources, including surface streams, lakes, Fort Peck Reservoir, springs, potholes, and groundwater. Some of the appropriations were developed or improved with partial or total funding by the United States. Some of the appropriations were impounded in small instream or offstream reservoirs, with or without partial or total funding by the United States.

Both prior to and during the time that these stockwater rights were being appropriated, a number of federal actions influenced the use of this federal land. As a consequence, the land where these stockwater claims were appropriated and used now consists of a jigsaw puzzle of overlapping jurisdictions which includes the public domain, federal reserved lands, U.S. Army Corps of Engineer-administered recreation areas, BLM-managed Wild and Scenic Missouri River, three State Parks, other State lands (including school trust lands), and private inholdings.[3] On any given day, therefore, a single cow in an allotment might graze on private, state and federal reserved, federal unreserved, and federal acquired lands and drink water from the variety of sources described above.

In the Information and Position Brief of the United States of America, the United States described the various claims in dispute as fitting into one or more of the following fact patterns:

- The water source is an undeveloped spring or instream water for which the legal descriptions for point of diversion and place of use include public lands. There is no development or apparent investment by either the United States or

[3] In 1985-1986, for example, there were sixty-five refuge grazing allotments on the CMR, with eighty eight permittees, five of which resided on private inholdings. *See, e.g.*, Record of Decision for Management of the Charles M. Russell National Wildlife Refuge, Montana , 51 Fed. Reg. 24,935 (July 9, 1986).

the permittee.

- The water source is located on federal public lands and a development appears to have been privately constructed or the BLM has no records of any federal funding for project. Some developments were apparently constructed prior to passage of the Taylor Grazing Act, and some were apparently constructed afterwards.

- The water source is located on public lands and the development appears to have been constructed by BLM or cost-shared by BLM based on priority dates and/or actual funding information.

- Claims in which a field check by BLM personnel at claimed site did not locate any water.

- Permittee claims a priority date *senior* to the reservation date for lands reserved from the public domain. These claims are for water from springs and from Fort Peck Reservoir with priority dates in the 1880s, when the area was first opened as unreserved public domain. However, no claimant has been able to demonstrate a contractual relationship or privity of title with an original appropriator.

- Permittee claims a priority date *junior* to the reservation date for lands reserved from the public domain. These claims are not only for water from Fort Peck Reservoir, but also for developed facilities like wells and small reservoirs.

- Permittee claims a priority date *before* the United States acquired the land.

- Permittee claims a priority date *after* the United States acquired the land.

The following are the United States' primary arguments.[4] First, Montana water users could not make a valid appropriation of water from a spring or reservoir on the public domain for stock watering because they could not demonstrate their use of water was to the exclusion of others or that the sources were completely subject to their dominion and control, all prerequisites asserted to be required by *Jones v. Hanson* (1958), 133 Mont. 115, 119, 123,

[4] Reply Brief of United States in Support of Objections to Water Master's Report, Case 40E-A 4-6 (Dec. 4, 1991); United States' Brief in Opposition to Claimants' Motion for Partial Summary Judgment and in Support of the United States' Motion for Partial Summary Judgment, Case 40E-A 4-7, 10 (Feb. 11, 1991); Information and Position Brief of the United States of America, Case 40E-A 5 & 7 (Feb. 5, 1990).

320 P.2d 1007, 1010, 1012. Second, the public policy reasons supporting federal ownership of the water rights on public lands are identical to the policy statements set forth in *Pettibone* and the *Pettibone* holding should, therefore, be applied to the claims involved in this case. Third, the Act of January 13, 1897, the 1916 Stock Raising Homestead Act, and the Executive Order of April 17, 1926 ("Public Water Reserve No. 107") required the water resources at issue here to be open and free for public use, and, therefore, no use of these resources could meet the exclusivity requirements of *Jones v. Hanson*. Fourth, permittees under the Taylor Grazing Act of 1934 cannot use their permits as a vehicle to appropriate water from sources on federal lands.

In their Position Brief, the Claimants argue mostly to the contrary. They do state that they have not claimed private stockwater rights in water projects developed soley by the United States, or projects developed with permission or by license from the United States after passage of the Taylor Grazing Act of 1934, or projects developed by Claimants after passage of the Taylor Grazing Act. The Claimants agree that if the United States later permitted a larger development on a site previously appropriated or developed by a Claimant, and there was no participation by the Claimant or his predecessors-in-interest in the later effort, then the United States' is entitled to a water right for the increased supply of water.

In its last brief, the United States acknowledges that it does not question the principle that the Taylor Grazing Act "protects appropriative water rights acquired *prior* to the enactment of the statute or thereafter validly appropriated."[5] However, the United States then argues that there are no such rights in Montana because "one who waters stock on the public domain prior to or after the Taylor Grazing Act did not and could not satisfy the exclusivity of use requirement of Montana law."[6]

**A.**

**Exclusive Use, Dominion, and Control**

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[5] Reply Brief of United States in Support of Objections to Water Master's Report, Case 40E-A 5 (Dec. 4, 1991).

[6] Objections of the United States to the Water Master's Report, Case 40E-A 13 (Sept. 23, 1991) (citing Brief in Opposition to Claimant's Motion for Partial Summary Judgment and in Support of United States' Motion for Partial Summary Judgment, Case 40E-A 12 (Feb. 11, 1991)).

The United States first argues that the stockwater claims in this case are invalid under Montana law because prior to July 1, 1973, Montana required appropriators to maintain exclusive use, dominion, and control over water and its source in order to appropriate and maintain a private right to the use of the water on the public domain. The United States relies heavily on *Jones v. Hanson* to support this argument. The United States has misinterpreted Montana water law.

Water law in Montana was born in the rough and primitive gold fields of California, where an enforceable water right was acquired simply by taking possession of water on the public domain and putting it to beneficial use, with first in time being first in right.[7] Those customs ripened into well-recognized rules, known as the prior appropriation doctrine, which were subsequently adopted by Montana's early settlers and ultimately given the force of law by Congress, the Montana legislature, the United States Supreme Court and the Montana Supreme Court. *Mettler v. Ames Realty Co.* (1921), 61 Mont. 152, 170-71, 201 P. 702, 707-08.[8]

As the settlement of Montana grew and competition for water increased, the early doctrine was augmented by legislation and the rulings of the Montana Supreme Court.

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[7] *See generally In the Matter of the Adjudication of the Missouri River Drainage Area*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396; *In the Matter of the Adjudication of the Dearborn Drainage Area* (1988), 234 Mont. 331, 340, 766 P.2d 228, *overruled in part by Missouri River Drainage Area*, 2002 MT 216, 311 Mont. 327, 55 P.3d 396; *Mettler v. Ames Realty Co.* (1921), 61 Mont. 152, 201 P. 702; *Maynard v. Watkins* (1918), 55 Mont. 54, 173 P. 551; *Bailey v. Tintinger* (1912), 45 Mont. 154, 122 P. 575; *Smith v. Duff* (1909), 39 Mont. 382, 102 P. 984; *Toohey v. Campbell* (1900), 24 Mont. 13, 60 P. 396; *Murray v. Tingley* (1897), 20 Mont. 260, 50 P. 723; *Kleinschmidt v. Greiser* (1894), 14 Mont. 484, 37 P. 5; *Sweetland v. Olsen* (1891), 11 Mont. 27, 27 P. 339; *Woolman v. Garringer* (1872), 1 Mont. 535; *King v. Edwards* (1870), 1 Mont. 235. *See also Broder v. Water Company* (1879), 101 U.S. 274, 25 L. Ed. 790, 11 Otto 274; *Basey v. Gallagher* (1874), 87 U.S. 670, 682, 22 L. Ed. 452, 455, 20 Wall. 670 ("The views [in *Atchison v. Peterson*] expressed and the rulings made are equally applicable to the use of water on the public lands for purposes of irrigation. No distinction is made in those States and Territories by the custom of miners or settlers, or by the courts, in the rights of the first appropriator from the use made of the water, if the use be a beneficial one."); *Atchison v. Peterson* (1874), 87 U.S. 507, 510-11, 22 L. Ed. 414, 415, 20 Wall. 507 ("By the custom which has obtained among miners in the Pacific States and Territories, where mining for the precious metals is had on the public lands of the United States, the first appropriator of mines, whether in placers, veins, or lodes, or of waters in the streams on such lands for mining purposes, is held to have a better right than others to work the mines or use the waters. The first appropriator who subjects the property to use, or takes the necessary steps for that purpose, is regarded, except as against the government, as the source of title in all controversies relating to the property.").

[8] *See, e.g.,* Mont. Const. art. III, § 15 (1889); Act of March 3, 1877, 43 U.S.C. § 321; Act of July 9, 1870, 30 U.S.C. § 52 (amending Act of July 26, 1866); Act of July 26, 1866, 43 U.S.C. § 661; § 1, 1885 Mont. Laws 130; §§ 737-38, 1879 Mont. Laws 52; Ch. 34, §§ 11, 12, 1872 Mont. Cod. Stat.; §§ 2, 8, 9, 1869-1870 Mont. Laws; cases cited, *supra* note 15.

However, neither Montana law nor custom has ever required the "exclusive use, dominion, and control" of a water source in order to appropriate a private water right, unless the appropriator was claiming an exclusive right to use an entire water source, or claiming the right by prescription.[9] The Montana Supreme Court set forth the controlling rule in *Bullerdick v. Hermsmeyer*, where it stated that:

> The use of the waters in the streams in this state is declared by the Constitution to be a public use. (Constitution, Art. III, sec. 15) Such being the case, every citizen has a right to divert and use them, so long as he does not infringe upon the rights of some other citizen who has acquired a *prior right* by appropriation. Each citizen may divert and use them without let or hindrance when no *prior right* prevents. When his necessary use ceases, he must restore them to the channel of the stream, whereupon they may be used by any other person who needs them.

*Bullerdick v. Hermsmeyer* (1905), 32 Mont. 541, 554-55, 81 P. 334 (emphasis added). In *St. Onge v. Blakely*, the Montana Supreme Court reiterated that:

> [T]wo parties may at the same time be in possession of water from a creek and neither hold adverse to the other; each may justly claim the right to use the water he is using, without affecting the rights of the other, and therefore, in order to constitute adverse possession of water, the burden is upon the claimant to show that his use of water deprived the prior appropriators of water at times when such prior appropriators actually needed the water . . . . and therefore proof merely that the claimant used water and claimed the right to use it is no proof whatever of adverse use.

*St. Onge v. Blakely* (1926), 76 Mont. 1, 16, 245 P. 532 (citations omitted) .

The language in *Jones v. Hanson*, cited by the United States in support of its argument, stands only for the proposition that proof of exclusive use, dominion, and control

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[9] A fundamental aspect of the early prior appropriation doctrine was that "the one who first appropriates water has *the sole right* to use the same for the purpose for which it was appropriated, *to the exclusion* of any subsequent appropriation for the same purpose or for any other use of the water, and to the full extent of his appropriation if necessary for his beneficial uses." 1 Wells A. Hutchins, *Water Rights Laws in the Nineteen Western States* 569 (1971) (emphasis added). This principle was recognized by the Montana Supreme Court in *Mettler v. Ames Realty Co.*, when it held that the doctrine of prior appropriation "sanctions the right of an appropriator to the use of all the waters of a stream, *to the exclusion* of riparian proprietors and junior appropriators, if the entire flow of the stream has been appropriated by him, and the only limitations imposed upon the extent of his appropriation are his needs and facilities for use." 61 Mont. at 159.

of a water source was required when an appropriator claimed the exclusive use of an entire water source, or claimed a water right by prescription. *Jones*, 133 Mont. at 119, 123.

In *Jones*, the plaintiff claimed the exclusive right to the use of *all* the waters of Bynum Springs based on two notices of appropriation filed by his predecessors-in-interest, and alternatively, upon a right by prescription. *Jones*, 133 Mont. at 117. The lower court granted the plaintiff's alternative claim of right by prescription, because it found that the plaintiff's use of Bynum Springs had been "actual, open, *exclusive*, notorious, adverse, visible, continuous and uninterrupted" for the statutory period and, therefore, the plaintiff had the "exclusive right to the use of all of the waters of Bynum Springs for domestic purposes, for watering of sheep, cattle, and livestock, and for the purpose of irrigating and watering the lands and premises owned by him." *Jones*, 133 Mont. at 119 (emphasis added).

On appeal, the Montana Supreme Court reversed the lower court's grant of the plaintiff's alternative prescriptive claim. The Court identified the issues, the salient facts, and its conclusion as follows:

> The pleadings are voluminous, but the issues are narrowed to the question of whether the plaintiff is entitled to the full use of the waters of Bynum Springs, which are located on land belonging to the defendant, for the irrigation of plaintiff's land located some distance from the springs; . . .
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> . . . .
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> There is no dispute in the evidence as to the appropriations made by plaintiff's predecessors in interest, which are the basis for his claim to the waters of Bynum Springs. The appropriation was from Spring Coulee, not the springs. Since the point of diversion (which has never been changed) was not at the springs, but was at a point on Bynum Coulee, on a dam or reservoir constructed for the purpose of impounding the waters; the only basis for claiming ownership of the waters of the springs, with the right to the relief granted by court, must necessarily be based on a title by prescription. To sustain the burden of proof, the plaintiff showed that in 1906, or thereabouts, there were constructed two boxes, one around each of two of the three springs, . . .
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> . . . .
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> . . . From the preponderance of the evidence, we feel that the [lower] court was hardly justified in finding, if it was the intention of the court to so find, that the plaintiff had used the water for drinking purposes at all times since 1906.

> From the evidence it would appear much more likely that he was continuing to haul water occasionally solely to keep in effect his claim to the use of the water . . .
> . . . .
> Under the evidence offered here, it would appear that at the time the springs were boxed, the plaintiff had no thought that it was being done in connection with the use of the water for irrigation purposes or to assist in the natural flow thereof.
> In any event, the use of the springs as a watering place for cattle and of the neighborhood generally for drinking water is undisputed. There is no showing by plaintiff that his use of the water was to the *exclusion* of others and since the springs were not subject to the complete domain and control of the plaintiff, it necessarily follows that the boxing of the springs did not constitute a valid appropriation of water for any purpose, nor could it be one which would ripen into a title by prescription.

*Jones*, 133 Mont. at 116, 120-21, 123 (emphasis added).

It is the language in the last indented paragraph upon which the United States bases its argument. However, the *Jones* case simply does not stand for the proposition cited by the United States. The issue in the case was not about the plaintiff seeking the appropriation of stock water rights on the public domain. Instead, the case involved a plaintiff seeking the establishment of a prescriptive right to the use of Bynum Springs water and plaintiff's right to protect the springs from trespassing cattle, sheep, hogs, or other livestock. The *Jones* case is not applicable here.

The exclusivity argument was put to rest when the Montana Supreme Court confirmed that the essential elements of an appropriation have always been intent, beneficial use, and, if physically necessary, a diversion. *In the Matter of Adjudication of the Missouri River Drainage Area*, 2002 MT 216, ¶¶ 20, 22, 23, & 37, 311 Mont. 327, ¶¶ 20, 22, 23, & 37, 55 P.3d 396, ¶¶ 20, 22, 23, & 37 ("*Bean Lake III*"). Exclusivity was not mentioned.

Accordingly, this Court finds as a matter of law that prior to July 1, 1973, the exclusive use, dominion, and control of water was not required for the Claimants in this case to appropriate or maintain their private stockwater rights, unless they were claiming the right

to the exclusive use of an entire water source or claiming the water right by prescription.

**B.**

**Department of State Lands v. Pettibone**

The United States next contends that the possibility of a federal permittee dictating the use of federal land through the control of a water resource is as "repugnant" to the multiple use management policies of federal public lands as it is to the fiduciary principles applicable to State school trust lands. Although the United States acknowledges that "federal lands are not held in trust as are state school lands,"[10] the United States argues that the trust rationale applied by the Montana Supreme Court in *Pettibone*, 216 Mont. 361, is equally applicable to these appropriations of water on and for use on federal public lands. This Court is unpersuaded by this argument.

In *Pettibone*, the Montana Supreme Court held that water rights appropriated by lessees on and for use on school trust land are owned by the State of Montana for the benefit of the trust, not by the lessees. *Pettibone*, 216 Mont. at 368. The *Pettibone* decision, however, turned on the fact that the grazing lands involved were State school trust lands, which the United States Supreme Court and Montana Supreme Court have held are subject to the same fiduciary principles as private, charitable trusts. *Pettibone*, 216 Mont. at 369-71, 375. Finding that the appropriation of private water rights on trust land could interfere with the State's management of the trust and reduce its value, the Court implied an agency relationship and held that:

> The lessee, in making appropriations on and for school trust sections, is acting on behalf of the State. . . . The lessee, under the terms of the lease, is simply entitled to the *use* of water appurtenant to the school trust land. The State is the beneficial user of the water, and its duty as trustee of the school trust lands prohibits it from alienating any interest in the land, such as the appurtenant water right, without receiving full compensation therefor.
> . . . .
> . . . Absent such compensation, the title to the water rights in this case vest in

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[10] Information and Position Brief of the United States of America, Case 40E-A 6 (Feb. 5, 1990).

the State.

*Pettibone*, 216 Mont. at 368, 376 (italics in original).

The *Pettibone* Court, however, expressly distinguished the fiduciary principles applicable to State school trust lands from the general rules applicable to other public lands and explained that:

> Respondents cite several cases that appear to articulate a contrary rule. The first, *Smith v. Denniff* . . . is distinguishable in the fact that it concerned water appropriations made by squatters on the federal lands who diverted water for use on the public domain. . . . As discussed above, school trusts lands are subject to a different set of rules than other public lands. Secondly, they cite *Hayes v. Buzzard* . . . Again, *Hayes* arose on public domain land, not school trust land.

*Pettibone*, 216 Mont. at 372.

Prior to 1973, a water right appropriated on the public domain in accordance with Montana law or custom generally vested in the appropriator. *Osnes Livestock Co. v. Warren* (1936), 103 Mont. 284, 290, 62 P.2d 206, 209; *St. Onge*, 76 Mont. at 18; *Smith v. Denniff* (1900), 24 Mont. 20, 27, 60 P. 398, 400. "When the right was fully perfected, that is, when there was a diversion of the water and its application to a beneficial use, it thereupon became a property right of which the owner could only be divested in some legal manner." *Osnes Livestock Co.*,103 Mont. at 294. *See also Smith*, 24 Mont. at 27 (stating that a water right is "a positive, certain, and vested property right" of which the appropriator could not be divested).

Unless and until the federal government reserves land or water for permanent federal purposes, or explicitly and clearly abandons its historical deference to state control over the water resources within a state's boundaries (a matter that will discussed next in great detail), this Court will not presume to do so through application of the *Pettibone* decision. Accordingly, when adjudicating the individual claims in this case, this Court will apply the traditional rules applicable to the appropriation of water on federal public lands in Montana,

and not the fiduciary trust principles uniquely applicable to Montana school trust lands.

**C.**

**Federal Law**

The parties and the Master discussed the ramification of several federal congressional acts on the appropriation of water on the public lands within Montana. The United States made most of these federal references as part of its exclusivity argument. A general overview of federal law will be helpful in the review of these federal statutes.

Concurrent Authority Over Water

The Property Clause of the United States Constitution invests Congress with the authority "to dispose of and make all needful Rules and Regulations respecting the Territory and other Property belonging to the United States," U.S. Const. art. IV, § 3. This is a power which the United States Supreme Court has traditionally construed with an "expansive reading" and with a repeated recognition of the right of the United States "to control their occupation and use, to protect them from trespass and injury and to prescribe the conditions upon which others may obtain rights in them." *Kleppe v. New Mexico* (1976), 426 U.S. 529, 539-40, 96 S. Ct. 2285, 2292, 49 L. Ed. 2d 34, 44 (quoting *Utah Power & Light Co. v. United States* (1917), 243 U.S. 389, 405, 37 S. Ct. 387, 389, 61 L. Ed. 791, 817). The fact that federal property is located within state geographical boundaries does not diminish that power. *Kleppe*, 426 U.S. at 539-40; *Hancock v. Train* (1976), 426 U.S. 167, 178-79, 96 S. Ct. 2006, 2012-13, 48 L. Ed. 2d 555, 564-65; *United States v. Rio Grande Dam & Irrigation Co.* (1899), 174 U.S. 690, 703, 19 S. Ct. 770, 775, 43 L. Ed. 1136, 1141; *United States v. Montgomery* (D. Mont. 1957), 155 F. Supp. 633, 635.

Montana, however, in its inherent and sovereign capacity, also has dominion and control over the land and waters within its borders. U.S. Const. Amend. X. Absent consent or cession, that dominion and control includes federal lands and the waters on or adjacent to them. Mont. Const. art. IX, § 3(3) (1972); *Kansas v. Colorado* (1907), 206 U.S. 46, 93, 27 S. Ct. 655, 665, 51 L. Ed. 956; *In re Adjudication of the Yellowstone River* (1992), 253

Mont. 167, 179, 832 P.2d 1210.

Only when the federal government properly asserts its authority to control the use of federal property, and state law conflicts with that authority, does federal authority preempt state law under the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2; *California v. United States* (1978), 438 U.S. 645, 668-78, 98 S. Ct. 2985, 2997-3003, 57 L. Ed. 2d 1018, 1034-41; *Kleppe*, 426 U.S. at 543.

Whether a federal action actually preempts state law in any single instance depends upon the intent of Congress or the Executive, as expressed in the language of the Act or Order, its legislative or administrative history, contemporary administrative and judicial decisions, the degree of conflict, and the relation of purposes of the federal legislation or executive order to the state aims. *See, e.g.*, *Leo Sheep Co. v. United States* (1979), 440 U.S. 668, 669, 682, 99 S. Ct. 1403, 1411, 59 L. Ed. 2d 677, 688; *California v. United States*, 438 U.S. at 668-78; George Cameron Coggins & Charles F. Wilkinson, *Federal Public Land and Resources Law* 209-10 (2d ed. 1987).

The United States Supreme Court has recognized certain rebuttable presumptions in close cases where congressional intent is unclear. Coggins & Wilkinson, *supra* at 210. Generally, in traditional areas of federal control, or when the Court finds that the need for uniform national regulation is compelling, the Court presumes that Congress intended for federal law to preempt conflicting state law. Coggins & Wilkinson, *supra*. Where no such tradition exists, or when no compelling need for uniform national regulation is present, the Court generally presumes that Congress intended for state law to control the issue. Coggins & Wilkinson, *supra*. In order to overcome either presumption, the Supreme Court has required clear and explicit evidence of congressional intent to the contrary. Coggins & Wilkinson, *supra*.

Acts of 1866, 1870, and 1877 and the Presumption of State Control

At least from 1862, if not before, Congress acquiesced in the use and disposition of the waters located on or under federal lands as fixed by territorial and state custom, rules,

and law. *California Oregon Power Co. v. Beaver Portland Cement Co.* (1935), 295 U.S. 142, 154-55, 162, 55 S. Ct. 725, 727-28, 731, 79 L. Ed. 1356, 1359-60, 1363-64. Out of this historical evolution, established judicial doctrine came to define certain "rights which the government had, by its conduct, recognized and encouraged and was bound to protect." *Broder*, 101 U.S. at 276. These rights received the formal confirmation of Congress on July 26, 1866, when Congress declared:

> Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and decisions of courts, the possessors and owners of such vested rights shall be maintained and protected the same; . . .

Act of July 26, 1866, ch. 262, § 9, 14 Sta. 253 (codified at 43 U.S.C. § 661 (2000)).

In its 1874 *Basey v. Gallagher* decision, an appeal from the Supreme Court of the Territory of Montana involving irrigation claimants on the public domain, the United States Supreme Court observed that in enacting the Act of 1866, Congress intended:

> to recognize as valid the customary law with respect to the use of water which had grown up among the occupants of the public land under the peculiar necessities of their condition; and that law may be shown by evidence of the local customs, or by the legislation of the State or Territory, or the decisions of the courts. The union of the three conditions in any particular case is not essential to the perfection of the right by priority; . . .

*Basey*, 87 U.S. at 684.

In 1870, Congress amended the Act of 1866 to clarify that:

> All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the [ninth section of the Act of 1866].

Act of July 9, 1870, ch. 235, § 17, 16 Stat. 218 (codified at 43 U.S.C. § 661 (2000)).

On March 3, 1877, Congress enacted the Desert Land Act, which regulated the entry

and reclamation of desert lands. Act of March 3, 1877, ch. 107, § 1, 19 Stat. 37 (codified at 43 U.S.C. § 321 (2000)). The Supreme Court found that by this Act, if not before, Congress "effected a severance of all waters upon the public domain, not theretofore appropriated, from the land itself" and "reserved [the waters] for the use of the public under the laws of the states and territories." *California v. United States*, 438 U.S. at 657-58 (quoting *California Oregon Power Co.*, 295 U.S. at 158, 162).

The Court emphasized that with respect to the waters of the public domain, this "severance" applied to *all* the waters of the public domain, not merely those waters to be appropriated by entrymen seeking mineral and land patents:

> By its terms, *not only* all surplus water over and above such as might be appropriated and used by the desert-land entrymen, *but "the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable*," were to remain "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes."

*California Oregon Power Co.*, 295 U.S. at 158 (emphasis added). The Court reasoned that:

> As the owner of the public domain, the government possessed the power to dispose of land and water thereon together, or to dispose of them separately. The fair construction of [Chapter 107 of the Desert Land Act] is that Congress intended to establish the rule that for the future the land should be patented separately; and that all non-navigable waters thereon should be reserved for the use of the public under the laws of the states and territories named. The words that the water of all sources of water supply upon the public lands and not navigable "shall remain and be held free for the appropriation and use of the public" are not susceptible of any other construction. . . . It is hard to see how a more definite intention to sever the land and water could be evinced.

*California Oregon Power Co.*, 295 U.S. at 162 (citation omitted). Between 1866 and 1958, Congress passed at least thirty-seven additional statutes in which it expressly recognized the importance of deferring to state water law. *United States v. New Mexico* (1978), 438 U.S. 696, 702, n. 5, 98 S. Ct. 3012, 3015, 57 L. Ed. 2d 1052, 1058.

In 1981, the Solicitor General for the Department of the Interior acknowledged the long history of congressional deference to state control over water in an Opinion stating that:

> *New Mexico* . . . and *California* . . . reaffirm that congressional deference to state control over water arises from the 1866, 1870, and 1877 Acts . . . and numerous other public land use statutes enacted over the years. The unavoidable conclusion to be reached from these cases is that Congress gave the states broad power to provide for the administration of water rights which would only be limited where necessary to accomplish the original purpose of a congressionally mandated reservation or to protect the navigation servitude. As a result of this implicit grant of power, the *presumption* is that state law will control all non-reserved claims unless Congress provides otherwise. If Congress wishes to abandon its historical practice of deference it must explicitly exercise its power. While Congress has retained the right to amend these laws and reassert legislative control over a portion or all of the remaining unappropriated water in a state, it has chosen not to do so.

Solicitor's Op. 36914, 88 I.D. 1055, 1064 (1981) (emphasis added). *See also* Solicitor's Op. 36914, 88 I.D. 253 (1981); Solicitor's Op. 36914, 96 I.D. 211 (1988).

That Opinion led the Secretary of the Interior to announce that:

> [T]here is no such thing as a "Federal non-reserved water right" . . . . That means Federal land managers must follow State water laws and procedures except where Congress has specifically established a water right or where Congress has explicitly set aside a Federal land area with a reserved water right. If they need more water for their programs, they must take their place in line like any citizen and let State authorities decide.

News Release, United States Department of the Interior (Sept. 11, 1981) (emphasis added).

Significantly, the Solicitor's Opinion and the Department of Interior's news release were issued during the middle of Montana's claim filing period. Water right claimants, including the United States, were required to file statements of claim of existing water rights by April 30, 1982.

The following year, Assistant Attorney General Theodore B. Olson of the Department of Justice issued an extensive Memorandum also reiterating the long history of deference and the resulting presumption:

> [T]he history of federal-state relations with respect to water rights in the western states and Congress' weighing of the competing federal and state interests establish a presumption that . . . in the absence of evidence of specific congressional intent to preempt state water laws, the *presumption* is that federal agencies can acquire water rights only in accordance with state

> law. The mere assignment of land management functions to a federal agency, without more, does not create any federal rights to unappropriated water necessary to carry out those functions.
>
> . . . .
>
> We conclude that the rationale of *California* and *New Mexico* must be applied to any assertion of federal water rights in the western states. To the extent the federal non-reserved water rights theory would suggest that federal water rights are created merely by the assignment of land management functions to a federal agency or authorization of a federal project, we believe that it does not have a sound legal or constitutional basis and does not provide an appropriate legal basis for the assertion of water rights by federal agencies. *New Mexico* and *California* make it clear that the federal constitutional authority to preempt state water law must be clearly and specifically exercised, either expressly or by necessary implication. Otherwise, the *presumption* is that the western states retain control over the allocation of unappropriated water within their borders.

Memorandum from Theodore B. Olson, Assistant Att'y Gen., Dep't of Justice, to Carol E. Dinkins, Ass't Att'y Gen., Land and Nat. Res. Div., 6 Op. O.L.C. 328, 332, 383 (June 16, 1982) (emphasis added).

The Assistant Attorney General emphasized, however, that:

> This does not mean that the federal government is helpless to acquire the water it needs to carry out its management functions on federal lands. If that water cannot be acquired under state law or by purchase or condemnation of existing rights, the remedy lies within the power of Congress. The Supremacy Clause provides Congress ample power, when coupled with the commerce power, the Property Clause, or other grants of federal power, to supercede state law.

6 Op. O.L.C. at 383.[11]

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[11] This traditional deference was echoed in a speech given by Secretary of the Interior Norton at an ABA Water Section seminar in San Diego, California, on February 20, 2003. Secretary Norton confirmed that:

> There are many areas where national interests predominate over state and local interests, such as defense, immigration, transportation and communication. Where important national interests are at stake or where there is a need for national uniformity of laws, we must look to Washington, D.C. But in the field of water law, we have a different system, one that is based on the unique history and traditions of our national experience. Since the mid-nineteenth century, federal policy has been to defer to the authority of the western states to manage their water rights. Starting more than a century ago, Congress saw development of the lands of the West as a national purpose. . . . But even though the federal government built huge water development projects that have changed the face of the West, Congress has continued to insist the federal projects must comply with state laws, and must acquire their water

Accordingly, the Water Court begins with the presumption that Montana law controls the appropriation of the water rights on the federal lands involved in this case – a presumption which can be overcome only by evidence of a clear and explicit exercise of federal authority to preempt state water law, or by necessary implication.

Federal Acts - "Open" and "Free Use" of Public Lands

In further support of its *Jones* exclusivity argument, the United States cites the language of the Act of January 13, 1897, the 1916 Stock Raising Homestead Act, and the Taylor Grazing Act of 1934. The United States emphasized that these enactments required livestock reservoirs to be open to the free use of persons desiring to water animals of any kind and not to be fenced. The United States argues that the "open" and "free use" language in these acts precludes a Montana water user from appropriating water on the public domain because, under these federal acts, a Montana water appropriator would never be able to meet the exclusivity criteria demanded by *Jones*.

The Court resolved the *Jones* exclusivity argument earlier. As these federal acts were part of the argument, however, they will be addressed on a limited basis.

Act of January 13, 1897

In the Mining Act of 1866 (and as amended), Congress expressly recognized the right under state law to acquire rights of way over the public domain for the construction and use of reservoirs used in the appropriation, storage, and conveyance of private water rights for mining, agriculture, manufacturing, and other purposes. *Utah Power & Light Co.*, 243 U.S. at 405-06. The Supreme Court noted that "the grant was noticeably free from conditions" and that no application, consent, approval, or public recording was required. *Utah Power & Light Co.*, 243 U.S. at 405.

Article III, Section 15 of the Montana Constitution (1889) provided that the

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rights under state laws.
Gale Norton, Address at the American Bar Association Annual Water Law Conference (Feb. 20, 2003).

appropriation and use of water "as well as the sites for reservoirs necessary for collecting and storing the same, shall be held to be a public use." In *Federal Land Bank v. Morris*, the Montana Supreme Court noted that:

> The western part of our state is now dotted with reservoirs, usually built near the headwaters of streams. This work has been encouraged at all times . . . It comes back to nothing else but the old principle that "he who saves something that would otherwise be lost is not only to be protected in what he has saved, but commended for so doing."
> . . . .
> . . . We are satisfied that the laws of Montana that apply to the acquisition of running water equally apply to the storage and use of flood or waste water, and the doctrine of "first in time, first in right" applies to both.

*Federal Land Bank v. Morris*, (1941), 112 Mont. 445, 455-56, 116 P.2d 1007, 1011.

The Act of January 13, 1897 was "an act providing for the location and purchase of public lands for reservoir sites" and provided that:

> Any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting livestock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such livestock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: *Provided, That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.*

Act of Jan. 13, 1897, ch. 11, § 1, 29 Stat. 484 (codified at 43 U.S.C. §§ 952-955 (2000)) (emphasis added). The stated purpose of the Act was:

> . . . to *facilitate the transportation of stock* from the extensive regions of South Dakota, Montana, and Wyoming. In driving large herds of cattle in these States to the terminal points of the lines of railways reaching into these regions, it is absolutely necessary that the stock should have water at stated intervals.

H.R. Rep. No. 1527 (1896) (emphasis added).[12]

There has been little analysis or application of this Act by the federal or state courts. However, the Act did not explicitly amend or repeal the Acts of 1866, 1870, or 1877 which recognized and confirmed the right to appropriate and impound private water rights in reservoirs on the public domain. Moreover, congressional deference to state control over the severed *waters* of the public domain was still a strong force in 1897 when this Act was enacted. *See California v. United States*, 438 U.S. at 653-63. Accordingly, this Court cannot conclude that the Act of January 13, 1897 was a "clear and explicit" exercise of federal authority to preempt state law.

Therefore, this Court finds that the Water Master was correct in concluding that the Act of January 13, 1897 did not preclude or preempt the right to appropriate private stockwater rights on the public domain under Montana law.

**D.**

**Stock Raising Homestead Act and Public Water Reserve No. 107**

On June 25, 1910, Congress passed the Pickett Act, which authorized the President to "temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States . . . and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals. . . ." Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (repealed in 1976). The Federal Land Policy and Management Act of 1976, P.L. 94-579, Title VII, § 704(a), 90 Stat. 2792, repealed the

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[12] In 1902, the Senate Committee on Public Lands reported that:

> Pursuant to this legislation numerous reservoir sites have been located and reservoirs constructed in different parts of the arid and semiarid West for *the purpose of creating watering places for livestock upon the public ranges of the West, and especially in order to have suitable watering places at regular intervals for beef cattle that may be driven from the ranges to the shipping stations during the dry season of the summer and fall*. In the main the experiments which have been made under the provisions of this act have been successful and have demonstrated that it is entirely practicable to store large quantities of surface water that come from the melting snows and early rains of the spring time for use during the drought season of the year.

S. Rep. No. 2094, (1902) (emphasis added).

Pickett Act, but all previous withdrawals under the Pickett Act were expressly preserved unless and until modified as specified in the Order. P.L. 94-579, Title VII, § 701(c), 90 Stat. 2786.

To encourage small stock raising homesteads on the public domain, Congress passed the Stock Raising Homestead Act of December 29, 1916 ("SRHA"), which authorized entry on up to 640 acres of land designated as being "chiefly valuable for grazing and raising forage crops." Act of Dec. 29, 1916, ch. 9, § 10, 39 Stat. 862 (repealed in 1976). Section 10 of the Act directed that:

> [L]ands containing water holes or other bodies of water needed or used by the public for watering purposes shall not be designated under this Act but *may be reserved under the provisions of [the Pickett] Act* of June twenty-fifth, nineteen hundred and ten, and such lands heretofore or hereafter reserved shall, *while so reserved, be kept and held open to the public use for such purposes under such general rules and regulations as the Secretary of the Interior may prescribe*.

Act of Dec. 29, 1916, ch. 9, § 10, 39 Stat. 862 (repealed in 1976) (emphasis added). The Act also established stock driveways to insure access by the public to watering places which had been reserved, and to allow for the unhampered passage of livestock across the public domain for grazing purposes. Act of Dec. 29, 1916, ch. 9, § 10, 39 Stat. 862 (repealed in 1976). *See also* James Muhn, *The State of the Law, Public Water Reserves: The Metamorphosis of a Public Land Policy*, 21 J. Land Resources & Envtl. L. 67, 99 (2001).

A Committee Report discussing the Act stated that Section 10 of the Act was a new section which authorized the Secretary of the Interior:

> . . . to withdraw from entry and hold open for the general use of the public, important water holes, springs, and other bodies of water that are necessary for large surrounding tracts of country, so that a person cannot monopolize or control a large territory by locating as a homestead the only available water supply for stock in that vicinity.

*United States v. City & County of Denver* (Colo. 1982), 656 P.2d 1, 32 n.48 (quoting H.R. Rep. No. 35, at 18 (1916)).

On April 17, 1926, pursuant to Section 10 of the SRHA, President Coolidge approved Public Water Reserve No. 107, which withdrew and reserved most tracts of unsurveyed federal land containing substantial springs or waterholes as follows:

> [I]t is hereby ordered that every smallest *legal subdivision of public-land* surveys which is *vacant unappropriated unreserved public land and contains a spring or water hole*, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same *is hereby, withdrawn* from settlement, location, sale, or entry, and *reserved* for public use in accordance with the provisions of Section 10 of the act of December 29, 1916.

Exec. Order Pub. Water Reserve No. 107 (April 17, 1926) (emphasis added). The United States contends that "under the rationale of the decision [*City and County of Denver*] relied upon by the Water Master, the United States would be entitled to all the water necessary to provide a watering supply for all stock allowed to graze the permits."[13] This contention requires a short discussion of the federal reserved water rights doctrine.

Federal Reserved Water Right Doctrine

In a series of cases beginning in 1897, the United States Supreme Court examined the often conflicting jurisdiction between state and federal government with respect to the waters on or adjacent to federal lands and concluded that whatever power the states had acquired over the waters within their borders as a result of the Acts of 1866, 1870, and 1877, Congress did not intend thereby to relinquish its authority to reserve unappropriated water in the future for use on "appurtenant" lands withdrawn from the public domain and reserved for specific federal purposes. *New Mexico*, 438 U.S. at 700; *California v. United States*, 438 U.S. at 662-63; *Cappaert v. United States* (1976), 426 U.S. 128, 138, 143-46, 96 S. Ct. 2062, 48 L. Ed. 2d 523; *Arizona v. California* (1963), 373 U.S. 546, 597-98, 83 S. Ct. 1468, 10 L. Ed. 2d 542; *Winters v. United States* (1908), 207 U.S. 564, 577, 28 S. Ct. 207, 52 L. Ed. 340; *Rio Grande Dam & Irrigation Co.*, 174 U.S. at 703.

In *Cappaert v. United States,* the United States Supreme Court summarized the

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[13] Objections of the United States to the Water Master's Report, Case 40E-A 14 (Sept. 23, 1991).

federal reserved water right doctrine as follows:

> This Court has long held that when the Federal Government withdraws its land from the public domain and reserves it for a federal purpose, the Government, by implication, reserves appurtenant water then unappropriated to the extent needed to accomplish the purpose of the reservation. In so doing the United States acquires a reserved right in unappropriated water which vests on the date of the reservation and is superior to the rights of future appropriators.
> . . . .
> In determining whether there is a federally reserved water right implicit in a federal reservation of public land, the issue is whether the Government intended to reserve unappropriated and thus available water. Intent is inferred if the previously unappropriated waters are necessary to accomplish the purposes for which the reservation was created.
> . . . .
> The implied-reservation-of-water-rights doctrine, however, reserves only that amount of water necessary to fulfill the purposes of the reservation, no more.

*Cappaert*, 426 U.S. at 138, 139, 141.

In *New Mexico*, the Court discussed the limitations of the doctrine as follows:

> While many of the contours of . . . [the doctrine] remain unspecified, the Court has repeatedly emphasized that Congress reserved "only that amount of water *necessary to fulfill the purpose of the reservation, no more*." . . .
> . . . .
> . . . Where water is necessary to fulfill the very purposes for which a federal reservation was created, it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water. *Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator*.

*New Mexico*, 438 U.S. at 700, 702 (emphasis added).

Even when federal land and water has been reserved and exempted from private appropriation, the United States Supreme Court has confirmed that the federal government may still intend for those unreserved waters, not necessary for the primary purposes of the reservation, to remain available for private appropriation by permittees. *New Mexico*, 438 U.S. at 700, 702. In *New Mexico*, the Court held:

> What we have said also answers the Government's contention that Congress intended to reserve water from the Rio Mimbres for stock watering purposes. The United States issues permits to private cattle owners to graze their stock on the Gila National Forest and provides for stockwatering at various locations along the Rio Mimbres. The United States contends that, since Congress clearly foresaw stockwatering on national forests, reserved rights must be recognized for this purpose. The New Mexico courts disagreed and held that any stockwatering rights must be allocated under state law to individual stock waterers. We agree.
>
> . . . Congress intended the water supply from the Rio Mimbres to be allocated among private appropriators [including grazing permittees] under state law. There is no indication in the legislative histories of any of the forest Acts that Congress foresaw any need for the Forest Service to allocate water for stockwatering purposes, a task to which state law was well suited.

*New Mexico*, 438 U.S. at 715-17 (citations omitted).

Federal Reserved Water Right Doctrine and Public Water Reserve No. 107

Whether the federal government intended to reserve water when it reserved the land in Public Water Reserve No. 107, has not yet been decided by the United States or Montana Supreme Courts.[14] The Department of the Interior's own interpretation and implementation of Public Water Reserve No. 107 has been conflicting and evolving over time. *See generally* Muhn, *supra.*

It is neither appropriate nor necessary to decide the issue in this case. The claims involved in this case are not for federal reserved water rights, but for private stockwater rights.[15] For purposes of these motions for summary judgment, therefore, this Court simply

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[14] Both the Colorado and the Idaho Supreme Courts have concluded that federal water rights were reserved by Public Water Reserve No. 107, but they differ as to the scope and extent of those rights. *See generally United States v. City & County of Denver* (Colo. 1982), 656 P.2d 1; *United States v. Idaho* (Idaho 1998), 959 P.2d 449.

[15] At some future date, the issue may be addressed by the Water Court. By letter dated April 2, 1998, the Reserved Water Rights Compact Commission formally notified the Water Court, pursuant to § 85-2-704, MCA, that negotiations between the United States Bureau of Land Management and the State of Montana for any and all reserved water right claims except those for the Upper Missouri National Wild and Scenic River and the Bear Trap Canyon Public Recreation Site were terminated as of April 2, 1998. As a result, the Water Court included three BLM reserved water right claims, based on Public Water Reserve No. 107, in its November 14, 2003 Basin 42KJ Temporary Preliminary Decree Water Court decree.

reiterates the well-established rule that valid state based water rights appropriated prior to creation of a federal reserved water right are not affected by the federal reservation, and that state based water rights appropriated subsequent to the creation of a federal reserved water right in the same source, though not necessarily precluded, *New Mexico*, 438 U.S. at 700-02, are subordinate and subject to the federal reserved right. *Cappaert*, 426 U.S. at 138; *Arizona*, 373 U.S. at 597-600.

**E.**

**The Taylor Grazing Act of 1934**

The public's free and unregulated use of the public domain for grazing purposes came to an end on June 28, 1934, when Congress passed the Taylor Grazing Act. Act of June 28, 1934, ch. 865, § 1, 48 Stat. 1269 (codified at 43 U.S.C. §§ 315 through 320(2000)). The purpose of the Act was to stop injury to the public grazing lands by preventing overgrazing and soil deterioration; to provide for their orderly use, improvement, and development; and to stabilize the livestock industry dependent upon the public range. 43 U.S.C. § 315a (2000); *Public Lands Council v. Babbitt* (2000), 529 U.S. 728, 733, 120 S. Ct. 1815, 1819, 146 L. Ed. 2d 753, 760; *Fallini v. Hodel* (9th Cir. 1992), 963 F.2d 275, 279; *Kidd v. United States Dep't of Interior, Bureau of Land Mgmt* (9th Cir. 1985), 756 F.2d 1410, 1411.

The Taylor Grazing Act did not close the public domain. Sections 1 and 2 of the Act authorized the Secretary of the Interior to establish grazing districts of vacant, unappropriated, and unreserved parts of the public domain that were chiefly valuable for grazing and raising forage crops, and to regulate the districts through a permit and lease system in conjunction with the States. 43 U.S.C. § 315a (2000).[16] Under the Act, publication of notice of a proposed grazing district effected a withdrawal of all public lands

[16] Title 76, Chapter 16, of the Montana Code Annotated, known as the Montana Grass Conservation Act, was enacted to provide a means of cooperation between cooperative grazing districts authorized and organized pursuant to Montana law and federal agencies authorized to regulate grazing on federal lands pursuant to the Taylor Grazing Act. *See Kalfell Ranch, Inc. v. Prairie County Coop. State Grazing Dist.*, 2000 MT 317, 302 Mont. 492, 15 P.3d 888; *Watson v. Barnard* (1970), 155 Mont. 75, 79, 469 P.2d 539, 541.

within the exterior boundary of the proposed district from all forms of entry or settlement. 43 U.S.C. § 315a (2000).

The federal courts, the Department of the Interior, and most commentators have consistently taken the position that the Taylor Grazing Act did not effect a permanent reservation or dedication of land or water for specific public purposes and was intended by Congress to be a land classification and management statute only.[17] The United States represented to this Court that it is not asserting reserved rights in Montana's adjudication effort for stockwater pursuant to the Taylor Grazing Act.[18]

The Taylor Grazing Act did not explicitly amend or repeal the Acts of 1866, 1870, or 1877, or abandon Congress' historical deference to state control over the appropriation of water on unreserved federal lands. *See Kidd*, 756 F.2d at 1411; *United States v. Fallbrook Pub. Util. Dist.* (S.D. Cal. 1958), 165 F. Supp. 806, 844. In fact, the Act expressly provided that:

> [N]othing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands *or which may be hereafter initiated or acquired and maintained in accordance with such law.*

43 U.S.C. § 315b (2000) (emphasis added).

Although the Taylor Grazing Act did not preclude or preempt private appropriations of water, Sections 2 and 15 of the Act conferred broad authority on the Secretary of the Interior to regulate the occupancy and use of lands both within and outside of grazing districts and to attach such terms and conditions to permits as are reasonably necessary to

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[17] *See, e.g., Kidd v. United States* (9th Cir. 1985), 756 F.2d 1410, 1411; Memorandum from Theodore B. Olson, Ass't Att'y Gen., Dep't of Justice, to Carol E. Dinkins, Ass't Att'y Gen., Land and Nat. Res. Div., 6 Op. O.L.C. 328, 360 (June 16, 1982); Solicitor's Op. —36914 (Supp. III), 96 I.D. 211 (1988); Solicitor's Op. —36914 (Supp.), 88 I.D. 253, 256 (1981); Solicitor's Op. —36914, 86 I.D. 553, 592 (1979); George Cameron Coggins et al., *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 12 Envtl. L. 535, 584 (1982).

[18] United States Brief in Opposition to Claimants' Motion for Partial Summary Judgment and in Support of the United States' Motion for Partial Summary Judgment, Case 40E-A 9 (Feb. 11, 1991).

fulfill the purposes of the Act and the mandates of other federal laws. 43 U.S.C. §§ 315a & 315m (2000).[19] Since the first set of grazing regulations were issued, BLM policies and regulations with respect to the appropriation of private stockwater rights on BLM-managed lands have changed, often depending on the administration in political office at the time.[20]

Accordingly, when adjudicating private stockwater claims, claimed to have been appropriated on federal lands that are administered and managed pursuant to the Taylor Grazing Act, this Court may need to consider whether any federal regulations, permits, or agreements in effect *at the time of the appropriations* precluded, superceded, or restricted the right to appropriate or exercise private stockwater rights on the federal land. As each statement of claim is prima facie proof of its contents, the burden of proving the existence

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[19] Section 2 of the Act authorized the Secretary to:

> make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range.

43 U.S.C. § 315a. Section 15 of the Act authorized the Secretary to, "where vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district . . . to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe." 43 U.S.C. § 315m.

[20] Joseph M. Feller, Professor, College of Law, Arizona State University, states that:

> Although BLM had no authority to cancel or modify state-created water rights that pre-dated the Taylor Grazing Act, until the early 1980s BLM typically required that any new livestock water rights on BLM-managed lands be in the name of the United States, thus precluding the establishment of additional private stockwater rights on those lands. . . .
>
> BLM changed course in the 1980s under President Reagan and his Interior Secretary, James Watt. The Reagan Administration not only allowed but encouraged ranchers to file for stockwater rights on BLM lands in their own names. The agency changed course again under the Clinton Administration. The Rangeland Reform regulations promulgated by Interior Secretary Bruce Babbitt in 1995 reestablished the pre-1980s policy and conformed BLM's policy with that of the Forest Service by providing that stockwater rights on BLM land "shall be acquired, perfected, maintained, and administered in the name of the United States" to the extent permitted by state law.
>
> The current Bush Administration's proposed new grazing regulations would change the rules concerning public-land stockwater rights once again. The proposed regulations would delete the requirement that new water rights be in the name of the United States. This change would allow rancher-permittees to acquire rights in their own names, while leaving BLM the "option" of acquiring water rights in the federal government's name where permitted by state law.

Joseph M. Feller, *Ride-em Cowboy: A Critical Look at BLM's Proposed New Grazing Regulations*, 34 Envtl. L. 1123, 1138 (2004) (footnotes omitted). Although the public review and comment period for a draft environmental impact statement to support the proposed December 8, 2003 revisions has ended, apparently no new rules have yet been finalized.

of any such restrictions would be on any objector advocating such restrictions. Absent such proof, this Court will presume that Montana law controlled the use and disposition of any unreserved water resources on federal public lands.

The Water Master correctly concluded that water rights located in Basin 40E within the grazing districts at issue, withdrawn under the Taylor Grazing Act of 1934, are subject to Montana substantive and procedural water law. (Master's Memorandum at 12).

**F.**

**Charles M. Russell and UL Bend National Wildlife Refuges**

In 1936, President Roosevelt created the Fort Peck Game Range by withdrawing approximately 762,000 acres of public domain in Montana.[21] On March 25, 1969, the Secretary of the Interior withdrew several thousand more acres to create the UL Bend National Wildlife Refuge. Pub. Land Or. 4588 (March 25, 1969). Public Land Order 2591 changed the name of the original Fort Peck Game Range to the Charles M. Russell National Wildlife Refuge.

The claims involved in this case are not for federal reserved water rights, but for private stockwater rights. Therefore, for purposes of these motions for summary judgment, this Court simply reiterates the well-established rule that valid state based water rights appropriated prior to creation of a federal reserved water right are not affected by any federal reservation and that state based water rights appropriated subsequent to the creation of a federal reserved water right in the same source, though not necessarily precluded, *New Mexico*, 438 U.S. at 700-02, are subordinate and subject to the federal reserved right. *Cappaert*, 426 U.S. at 138; *Arizona*, 373 U.S. at 597-600.

Over time, the Department of the Interior has established policies, promulgated regulations, and formed agreements that may have affected the acquisition or exercise of

[21] Information and Position Brief of the United States of America 2 (Feb. 5, 1990) (quoting Exec. Order No. 7509, 3 C.F.R. 227 (1936)). *See also Schwenke v. Secretary of Interior* (9th Cir. 1983), 720 F. 2d 571, 573.

these private stockwater claims.[22] Accordingly, when adjudicating the individual claims in this case that were appropriated on the CMR or UL Bend, this Court may need to consider whether any federal regulation, permit, or agreement in effect at the time of the appropriations precluded, superceded or restricted the right under state law to appropriate or exercise private stockwater rights on these lands. Again, however, the burden of proving such restrictions is on the objector advocating the restriction. Absent such proof, this Court will presume Montana law controls the use and disposition of the unreserved water resources on the refuges in this case.

**G.**

**Collateral Estoppel**

Although not mentioned by the attorneys, the primary issue in this case was litigated by the United States to final judgment before the Water Court in the Powder River Preliminary Decree in 1983.[23] In its March 31, 1983, Findings of Fact and Conclusion of Law, the Water Court identified the issue as follows:

> Does title to the water right vest in the appropriator (individual permittee) or the United States as owner of the land where the water is diverted?

Although the language used is slightly different, the issue presented by the United States in its Motion for Partial Summary Judgment in the instant case (set forth on pages 3 and 4 hereof) appears to be identical with the issue the United States presented to the Water Court in the 1983 Powder River action.

In its 1983 Conclusions of Law, the Water Court concluded:

> II.
>
> The water law of the governing state shall be applied to public domain lands of the United States.
>
> III.
>
> The point of diversion of all water rights at issue is on public domain lands owned by the United States.
>
> IV.

---

[22] *See e.g.,* Joint Regulations of the Secretaries of the Interior and Agriculture Relating to the Protection and Administration of Game Ranges, or Wildlife Refuges, Established in Conjunction with the Organization of Grazing Districts Under the Taylor Grazing Act, Fed. Reg. 37-672 (Feb. 26, 1937, filed March 8, 1937).

[23] See Powder River Claim File #3443 (Main Consolidation File).

> The appropriators of the water are individual permittees or their predecessors in interest.
>
> V.
>
> Under Montana law, title to a water right vests in an appropriator regardless of ownership of land.

On April 14, 1983, the Water Court entered its Final Judgment in the Powder River Decree. On May 16, 1983, the United States filed its Notice of Appeal to the Montana Supreme Court. On May 25, 1983, the United States filed its Amended Notice of Appeal. On September 20, 1983, the "appeal of the federal appellant," was dismissed by the Montana Supreme Court (Voluntary Dismissal of Appeal).

Significantly, as noted earlier on pages 18-20, the Solicitor General and Assistant Attorney General Theodore B. Olson issued their Opinion and Memorandum in 1981 and 1982 and both confirmed the legal principle that federal land managers must follow state water laws and procedures in the absence of congressional intent to the contrary. Less than one year after issuance of the Olson Memorandum, the United States dismissed its Powder River appeal.

In view of the prior litigation, the doctrine of collateral estoppel or issue preclusion may be applicable to one or more issues in this case. *See Peschel v. Jones* (1988), 232 Mont. 516, 521, 760 P.2d 51, 54 and *App. For Beneficial Water User Permit* (1996), 278 Mont. 50, 61-62, 932 P.2d 1073.

## Conclusion

The application of water to a beneficial use in Montana, together with the requisite intent to appropriate, constitutes an appropriation, unless initiated in trespass. *Missouri River Drainage Area*, ¶ 22; *Connolly*, 102 Mont. at 298-301, 57 P.2d at 782-833; The watering of livestock is a beneficial use of water. *Missouri River Drainage Area*, ¶ 26. The privately owned livestock on the public domain did not arrive through trespass. Instead, for many years, the United States government encouraged its western citizens to use the public domain to pasture and water their flocks and herds. As a result, many private livestock owners appropriated stock rights from water sources on the public domain.

Whether any federal rules, regulations, or agreements in effect on the date of the appropriation work as restrictions on these stock water rights are issues that may have to be resolved on a case by case basis. But, in general, this Court cannot conclude, as a universal principle, that Montana or federal law prohibited private livestock owners from acquiring state based water rights for the use of their livestock on the public domain prior to July 1, 1973; or that title to the rights to the use of water for livestock on the public domain and reserved lands should always be in the name of the United States.

DATED this 29th day of June, 2005.

*/s/ C. Bruce Loble*
C. Bruce Loble
Chief Water Judge

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